IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.159 OF 2006

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Maharashtra Industrial Development
Corporation ...Petitioner

v/s.

Govardhani Constructions Company ...Respondent

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Mr.C.J. Sawant with Mr.P.P.Chavan & Mr.Kiran Gandhi i/b Little & Co. for the Petitioner.

Mr.Aspi Chinoy Sr.Counsel with Mr.F.I.Devitre, Mr. Kishor Jawle, Mr.Harinder Toor, Mr.S.B. Pawar i/b S.K.Legal & Associates for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 20TH SEPTEMBER,2006

P.C.:

1. By this petition filed under Section 34 of the Arbitration & Conciliation Act the Petitioner challenges the award made by the sole arbitrator dated 7-12-2005 directing the Petitioner to pay an amount of Rs.13,42,89,395.60 with interest at the rate of 12% per annum with effect from 20-12-1997.

2. The facts that are material and relevant for deciding this petition are that the Petitioner who is Maharashtra Industrial Development Corporation issued a tender dated 27-10-1993 inviting offers for construction of Airstrip at Yavatmal. The estimated costs was Rs.1,59,26,027/-. The scope of the work was construction of runway 1372.0 x 30.5 meters. The Respondent submitted its offer. That offer was accepted and the Respondent was awarded the work. The Petitioner offered additional work to the Respondent. The Respondent by letter dated 2-12-1994 addressed to the Executive Engineer, MIDC, Yavatmal informed that the Respondent is ready to execute the additional work of extension of runway i.e. from

1372 x 30.5m to 2100m to 45m. At the same rate and on the same terms and conditions extension of time was granted for completion of the additional work. So far as the additional work awarded is concerned, it is common ground that the additional work included excavation and completion of the Runway in WBM standard. The Respondent, however, was directed to complete only the excavation part of the additional work. By letter dated 3-8-1995 the Executive Engineer informed the Respondent that "The status of the work as on the date of this letter is that the excavation is nearly complete and the formation work for the entire length 2100 Rmt. is completed. You will complete the remaining excavation. As regards the remaining W.B.M. standard runway you will limit the work for a size of 1372 rmt X 30.5 rmt. No further work in this regard will be paid for." By letter dated 16-7-1996, the Respondent inquired from the Executive Engineer that they are completing the work awarded to them and they have not removed their machineries because of the oral instructions from the Executive Engineer. They requested the Executive Engineer to permit them to remove their machineries. By letter dated 16-8-1996 the Executive Engineer directed the Petitioner to retain their machineries

at site. It appears that thereafter the Respondent was informed in 1997 by letter dated 19-12-1997 that their final bills have been cleared for payment and that they can remove the machineries. The dispute arose between the parties. The principal dispute, it appears between the parties, was regarding compensation claimed by the Claimant/Respondent for the machineries which remained idle on the site after completion of the work.

3. The matter was referred to the learned sole arbitrator. It appears that the claim No.1(a) to 1(d) made by the Claimant/Respondent related to the work actually carried out by the Respondent which was extra work. Claim No.2 related to compensation for the idle plant and machinery. It appears that the claimant filed a detailed statement of claim. The Petitioner filed its reply. The submission of the Petitioner was that Claim No.2 was beyond the jurisdiction of the arbitrator, because claim for compensation for idle plant and machinery did not arise out of the contract. It appears that during the pendency of the proceedings, an application for amendment of the statement of claim was made. That application was opposed, but the learned arbitrator

granted that application. Thereafter, both the parties have filed their documents. The Respondent led oral evidence. The Petitioner did not lead any oral evidence. The learned arbitrator made the award. The learned arbitrator held that the Respondent is entitled to payment against the claims Nos. 1(a) to 1(d) and against claim No.2. All other claims were rejected. It is this award, made by the learned arbitrator, which is challenged in this petition.

4. The first submission of the learned counsel appearing for the Petitioner is that in the original statement of claim filed by the Respondent it was claimed, in so far as claim No.2 is concerned, that the machinery was detained at the site because the Petitioner was contemplating awarding the work of further extension to the Respondent. That extension was never granted. Compensation on that count cannot be claimed by the Respondent because that claim does not arise out of the existing contract and therefore the learned arbitrator does not have the jurisdiction to award any amount against that claim. An application for amendment was made, by which the original stand was changed and it was claimed that

the machineries were directed to be retained at the site because the work already allotted to the Respondent was incomplete. It was submitted that thus by the amendment inconsistent plea was taken. There was inordinate delay in making the amendment application and therefore the learned arbitrator could not have granted that amendment.

5. An objection was raised on behalf of the Respondent that though oral submission is being made before the court that the order granting amendment in the claim statement is invalid, there is no ground raised in the petition challenging the validity of the order made by the learned arbitrator granting amendment. It was also urged that in a petition under Section 34, an order made by the learned arbitrator granting amendment in the pleadings cannot be challenged.

6. The learned Counsel appearing for the Petitioner, however, invited my attention to certain paragraphs of the petition, where the proceedings that took place before the learned arbitrator have been narrated and it is stated that the Petitioner contested the application for amendment made by the

Respondent and it was urged that this is enough to indicate to the Respondent that the Petitioner is challenging the validity of the order made by the arbitrator granting amendment. Reference was also made to ground (s) in the petition to contend that the Petitioner has challenged the validity of the order made by the learned arbitrator granting amendment. Though, there was debate before me on the question whether an order made by the arbitrator granting amendment in the statement of claim can be challenged in the petition challenging the award under Section 34, in my opinion, even assuming that a person who is challenging the award made against him by filing a petition under Section 34 can challenge the interlocutory order made by the arbitrator allowing amendment in the statement of claim, it goes without saying that the Petitioner would have to incorporate in his petition specific grounds indicating the challenges that the Petitioner wants to raise to the order granting amendment. The necessity of raising grounds in the petition filed under Section 34 in order to indicate to the other side the challenges which the Petitioner wants to raise to the validity of the order granting amendment so that the Respondent can make his submission in

relation to those challenges cannot be overemphasised. The learned Counsel appearing for the Petitioner referred to the rules framed by the court and contended that the rules do not require the Petitioner to raise the ground in the petition. In my opinion, the requirement of raising specific ground in the petition indicating the challenges that the Petitioner wants to raise to the validity of the award is the requirement of natural justice. The necessity of raising specific ground arises so that the Respondent can get adequate notice of the challenges that he has to meet. A learned Single Judge of this court by his judgment in the case of **Pushpa P. Mulchandani & ors. v/s. Admiral Radhakrishin Tahilani & ors., 2001 (1) Bom.C.R.592** has taken a view that after the period of limitation prescribed by Section 34 of the Arbitration Act is over, even, a ground by amendment cannot be added to the petition. Observations found in paragraph 29 of that judgment are relevant. They read as under:-

> 29. Mr.Chagla further contended that an application for setting aside the award under Section 34 of the 1996 Act has to be made within the limitation prescribed by the Act.

> This necessarily means that all grounds on which the award is sought to be set aside have to be taken in the petition itself. It is, therefore, not permissible for the Court to permit an amendment of the petition, that too after the period of limitation prescribed in that section has expired. That would tantamount to entertaining a fresh petition beyond the period of limitation. A.I.R.1967 S.C.1233 (Madan Lal (dead) by his legal representative v. Sundar Lal and another), is pressed into service in support of the proposition that an objection to the award which has been filed after the period of limitation cannot be treated as an application to set aside the award if it is filed beyond limitation. The contention is justified and needs to be upheld.
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> (emphasis supplied)

In the abovereferred paragraph of the judgment, the learned single Judge has clearly held that all grounds on which the award is sought to be set aside have to be taken in the petition itself. The judgment of the learned Single Judge in the case of

Pushpa Mulchandani has been referred to and approved by the Division Bench of this court in its judgment in the case of **Vastu Invest & Holdings Pvt. Ltd. v/s. Gujarat Lease Finance Ltd., 2001 Vo.103(2) Bom.L.R. 156** in paragraph 16 of that judgment. The Division Bench in the case of Vastu Invest & Holdings Pvt.Ltd. has also considered the question whether a ground can be permitted to be added in a petition filed under Section 34 after expiry of the period of limitation provided by Section 34. The observations of the Division Bench found in paragraphs 13 to 17 of that judgment are relevant. They read as under:-

> 13. In our view, the Chamber Summons was rightly dismissed. If the point of jurisdiction was an independent ground of attach on the award, then not having been raised within the period prescribed by sub-section (3) of Section 34, it could not have been entertained by the Court at all. If it was already contained in the Arbitration petition, then Chamber Summons was wholly redundant. Either way, the Chamber Summons was liable to fail.

14. The law has been well settled even under the Arbitration Act, 1940, that a ground not initially raised in the petition to challenge the award could not be permitted to be subsequently raised by an amendment, if the application for amendment itself was beyond the period of limitation fixed for filing of the petition, challenging the award.

15. We may point out that under the 1940 Act, the limitation for bringing a petition to challenge an award was prescribed by the Limitation Act, subject to the provisions of the Limitation Act and the power of condonation of delay contained therein. The 1996 Act has radically altered the situation. We cannot lose sight of the fact that the 1996 Act is intended to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law, inter alia, as indicated in the preamble. Consequently, the Act has permitted very limited scope of challenge to an arbitral award. Section 34(1) provides

that an arbitral award may be challenged only by an application for setting aside such award in accordance with sub-sections (2) and (3). Sub-sections (2) and (3) of Section 34 provide that an arbitral award may be set aside only on the grounds narrated in sub-section (2). Finally, sub-section (3) provides that such an application for setting aside an award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 33, from the date on which the said request had been disposed of by the Arbitral Tribunal. Thus there is extremely narrow power of condonation of delay vested in the Court by the proviso. The proviso empowers the Court, if satisfied that the applicant was prevented by sufficient cause from making the application within the period of three months, to entertain the application "within a further period of 30 days", but not thereafter".

16. The implication of this proviso and particularly the last three words in the

proviso came up for consideration of this Court. In a judgment to which one of us (B.N.Srikrishna, J.) was party, the view this Court expressed was that these words indicated that, whatever might have been the position in law earlier, after the coming into force of the 1996 Act, after expiry of the period of three months and 30 days, the Court has no power to condone the delay in the presentation of the petition. (See in this connection decision of Srikrishna, J., in Review Petition No.15 of 199, decided on 15th September, 2000). We agree with this view and endorse it with approval.

17. In these circumstances, we are of the view that the Chamber Summons, if it was intended to raise an independent ground of challenge to the arbitral award, could not have been entertained after the period of three months plus the grace period of 30 days as provided in the proviso to sub-section (3) of Section 34. If, on the other hand, it was not intended to raise an independent ground, on the basis that the petition itself

> contained the ground, the chamber summons was wholly unnecessary as necessary amplifications could be put forward during submissions. Looked at either way, the chamber summons was rightly dismissed, in our view. Consequently, we find no substance in Appeal No.683 of 2000. Hence, this appeal must fail and is hereby dismissed.

Perusal of ground (s), on which reliance is placed by the learned counsel appearing for the Petitioner to contend that he has challenged the order granting amendment made by the learned arbitrator shows that in that ground the Petitioner no where indicates the reason why according to the Petitioner the order made by the learned arbitrator granting amendment is illegal, inappropriate or irregular. What is contended by ground (s) is that even if the contents of statement of claim after amendment are considered, the case of the Respondent is not made out or that there are contradictions in that claim. Perusal of the provisions of Section 23 of the Arbitration Act shows that unless the parties agreed otherwise, the arbitration has the power to allow the parties to amend their pleadings. The relevant provisions are

sub-section (3) of Section 23. Sub-section (3) of Section 23 reads as under:-

> 23(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Perusal of the provisions of sub-section 3 of Section 23 shows that the arbitrator has been given a very wide power to allow amendments in the pleadings. The arbitrator can decline permission to the parties to amend their pleadings only in case the arbitrator finds that allowing the amendment in the pleadings is inappropriate having regard to the delay in making it. Therefore, it can be said that the only ground on which the application made by a party to the arbitration for amendment in the pleadings can be rejected by the arbitrator after he finds that there is undue delay in making the application. In the present case the application made by the Respondent for amendment in the statement of claim was allowed

by the learned arbitrator by a speaking order. Therefore, if the Petitioner desired to challenge the validity of that order it was for the Petitioner to raise the ground in the petition and indicate as to how with reference to the provisions of sub-section (3) of Section 23 the order was invalid or beyond the powers of the learned arbitrator. Permitting the Petitioner to argue that the order made by the learned arbitrator permitting amendment in the statement of claim is invalid, in the absence of any ground to that effect being raised in the petition, would be contrary to the principles of natural justice, apart from being contrary to the law laid down by the Division Bench of this Court in its judgment in the case of Vastu Invest & Holdings

Pvt.Ltd., referred to above. If a Petitioner can not, after the period of limitation is over, add a ground of challenge in the petition, obviously the Petitioner cannot be permitted to argue a ground, at the final hearing which is taking place after the period of limitation is over, which is not raised in the petition.

In my opinion, in the absence of the Petitioner

raising specific ground in the petition challenging the order granting amendment in the statement of claim made by the learned arbitrator, the Petitioner cannot be permitted to argue that the order granting amendment in the statement of claim made by the learned arbitrator is invalid.

7. So far as claim No.2 is concerned, it was urged that the machinery was directed to be retained at the site by the Executive Engineer by letter dated 16-8-1996. The Respondent himself has understood that letter to mean that he was directed to retain the machineries there because the Government was contemplating granting work of second extension of the Air-strip. For that purpose my attention was invited to statements made in the statement of claim and it was submitted that because the machinery was retained in contemplation of grant of second extension, the claim for compensation for the machinery which was retained at the site does not arise out of the existing contract and therefore, the learned arbitrator had no jurisdiction.

8. On the other hand, it was submitted by the learned counsel appearing for the Respondent, perusal

of the award shows that the learned arbitrator has considered the entire correspondence between the parties in relation to the retention of the machinery at the site after completion of the work as ordered by the Respondent and the learned arbitrator has recorded the finding. The interpretation that has been placed by the learned arbitrator on the letter dated 16-8-1996 and other correspondence is a possible construction and therefore, this court should not interfere with the same.

9. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that the learned arbitrator has recorded the finding that when first extension was granted, the Respondent was to excavate the runway upto 2100 mts. with WBM standards. Though the work of excavation admittedly was completed, the Respondent was directed not to do the WBM work. Therefore, the work under the first extension itself was not completed as awarded and the machinery was therefore directed to be retained for completion of that work as also because the State Government was contemplating awarding the work of further extension of air-strip. Perusal of the letter dated 16-8-1996, which is the crucial letter,

shows that it has been written with reference to the letter dated 16-7-1996 of the Respondent. Perusal of the letter dated 16-7-1996 shows that the subject of that letter was construction of Air-strip at Yavatmal Const. of Runway upto W.B.M. Std. In the letter dated 16-8-1996 the Executive Engineer refers to the fact that the Respondent has accepted to execute the additional work for extension of the Runway at the same rate. It is common ground that so far as the first extension is concerned, the Respondent has accepted to do the work at the same rate, but so far as the second extension is concerned, it was yet to be offered to the Respondent, therefore, there was no question of he agreeing to that work at the same rate and therefore, reading this letter in the light of the correspondence exchanged between the parties, before the letter as also after the letter, the learned arbitrator has held that the machinery was directed to be retained at site for the completion of the work granted because of first extension and therefore, he has jurisdiction to make the award in relation to that claim. After having gone through the record, I find that it cannot be said that the construction that is placed by the learned arbitrator on the letter is impossible. What is further to be

seen here is that though the letter dated 16-8-1996 is the crucial letter and it refers to telephonic communication between the parties, the Petitioner has chosen not to lead any oral evidence. Second aspect that requires to be considered is that it is not the case of the Petitioner that the machinery was not actually retained at the site . On the contrary it is an admitted position that the machinery was retained at site and that it was lying idle. It is also nobody's case that the machinery was retained at the site by the Respondent on his own. It is an admitted position that it was retained only because the officers of the Petitioner directed him not to remove the machinery. It is also nobody's case that though Respondent retained the machinery at the site as per the directions of the officers of the Petitioner, he is not entitled to claim any payment for keeping his machinery there. The only contention urged was that he cannot make claim for compensation before the learned arbitrator. Therefore, in my opinion, it cannot be said that the award has resulted in any failure of justice. Therefore, I do not see any reason to interfere with the conclusion reached by the learned arbitrator in this regard.

10. It was then contended that the award made by the learned arbitrator in relation to claim Nos.1(a) to 1(d) is illegal because the Claim Nos.1(a) to 1(d) was barred by the provisions of Clause 15(B) of the contract between the parties. Clause 15(B) reads as under:-

> Clause 15B- Under no circumstances whatever shall the Constructor be entitled to any compensation from Maharashtra Industrial Development Corporation on any account unless the Contractor shall have submitted the Claim in writing to the Engineer in charge within one month of cause of such claim occurring.

11. The learned arbitrator has held that clause 15(B) does not apply to claim 1(a) to 1(d) as they pertain to payment for the work done by the Respondent as per the contract and as per the instructions of the officers of the Petitioner and they are not claims in the nature of compensation. According to learned Counsel appearing for the Petitioner, claims Nos. 1(a) to 1(b) were for the extra work done by the Respondent and therefore

claims in relation to that extra work ought to have been made within a period of one month as required by clause 15(B).

. The same submissions which were advanced before the learned arbitrator were advanced before me. I have gone through the award and clause 15(B) specifically. The learned arbitrator after referring to the relevant aspects of the matter has held that clause 15(B) applies when the claim is for compensation and not for price of the work which is done by the contractor pursuant to the contract. In my opinion, the view that has been taken by the learned arbitrator is a possible view of clause 15(B) and therefore, in my opinion, it will not be appropriate for me to disturb the conclusion reached by the learned arbitrator in that regard.

12. It was next contended that the claim Nos.1(a) to 1(d) are also barred by the provisions of law of limitation. It was contended that in the written submissions that were filed by the Petitioner before the learned arbitrator, it was urged that claim Nos.1(a) to 1(d) are barred by the provisions of Indian Limitation Act. But the learned arbitrator

has not decided that issue.

13. On the contrary, on behalf of the Respondent it is contended that it was not argued before the learned arbitrator that Claim Nos.1(a) to 1(d) are barred by the law of limitation. The only submission that was made before the learned arbitrator was that the Claim No.1(a) to 1(d) is barred by the provisions of Clause 15(B) of the contract and therefore, the learned arbitrator in the award has dealt with only that contention. It was submitted that in the petition there is no ground to be found that though the Petitioner had argued before the learned arbitrator that Claim No.1(a) to 1(d) is barred by the law of limitation, the learned arbitrator has not considered that contention. It was also submitted that if according to the Petitioner, they had argued before the learned arbitrator that claim No.1(a) to 1(d) is barred by the law of limitation and the learned arbitrator has not considered that contention, they should have gone back to the learned arbitrator and requested him to consider their argument.

14. Now, perusal of the record shows that in the

petition, the Petitioner has raised a ground saying that the learned arbitrator failed to see that claim No.1(a) to 1(d) was barred by the law of limitation. It is also clear that in the written submissions that were filed before the learned arbitrator it is claimed that claim Nos.1(a) to 1(d) are barred by the law of limitation. On the basis of rival pleadings the learned arbitrator has framed an issue to the following effect:

"Whether any of the claims raised by the claimants are barred by limitation?

. Perusal of the award, however, shows that the learned arbitrator has considered the contentions of the advocate appearing for the Petitioner in this regard that claim Nos.1(a) to 1(d) were barred by clause 15(B) of the contract and that contention has been dealt with in detail by the learned arbitrator. Therefore from the award it is apparent that in so far as the issue No.6 is concerned, only one contention was raised before the learned arbitrator namely that the claims are barred by clause 15(B) of the contract. The award does not show that the

contention that claim Nos.1(a) to 1(d) are barred by law of limitation was urged before the learned arbitrator. In the petition also there is no ground urged that it was the oral argument before the learned arbitrator that claim Nos.1(a) to 1(d) apart from being barred by clause 15(B) of the contract, are also barred by the law of limitation. In my opinion, the learned Counsel appearing for the Respondent is right therefore in contending that in the absence of a ground being raised in the petition that though it was urged on behalf of the Petitioner that the claim Nos.1(a) to 1(d) are barred by the law of limitation, that contention has not been dealt with and decided by the learned arbitrator, the Petitioner cannot be permitted to urge the ground in this petition. Failure of the Petitioner to raise the ground in the petition to the above effect also denies the Respondent an opportunity to meet that ground by filing an affidavit for establishing before the court that the grounds that Claim No.1(a) to 1(d) are barred by the law of limitation also was not actually argued before the learned arbitrator.

15. The last submission that was made is that the learned arbitrator has awarded interest at the rate

of 12% p.a.. Awarding of interest at 12% is excessive. Perusal of the award shows that the learned arbitrator has given cogent reason why he has awarded interest at 12% p.a. The learned arbitrator has held that the Respondent who had claimed interest at the rate of 22% p.a. initially, thereafter, by making amendment had claimed interest at the rate of 18% p.a. The Petitioner was also claiming interest in relation to their counter claim at the rate of 18% p.a. The learned arbitrator has also considered the bank rate of interest before the year 2002 and has therefore, awarded interest at the rate of 12% p.a. While considering whether the rate of interest awarded by the learned arbitrator is excessive or not, in my opinion, provisions of Section 31(7)(b) of the Arbitration Act are also to be considered. Section 31(7)(b) lays down that if for the period after making of the award, the arbitrator has not indicated the rate of interest, then the judgment debtor is liable to pay interest at the rate of 18% p.a. on the awarded amount.

16. Taking overall view of the matter, therefore, in my opinion, it cannot be said that awarding of interest at the rate of 12% p.a. is in any way

excessive. I find from the record that the learned arbitrator has passed a detailed award, has referred to the entire correspondence on record for recording his finding and the conclusions that have been reached by the learned arbitrator, in my opinion, are all possible conclusions to be reached on the basis of the material available on record. Therefore, in my opinion, considering extremely limited jurisdiction of this court under Section 34 it would not be proper to interfere with the award made by the learned arbitrator. Petition therefore fails and is dismissed. The Petitioners are directed to pay costs of this petition to the Respondents as incurred by the Respondent.

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